Supreme Court, U.S.
FILED
JAN 7 - 2009
OFFICE OF THE CLERK

No. 08-473

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Petitioner,

v.

CADREE B. MATTHEWS,

Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of New Jersey,
Appellate Division

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANNE MILGRAM
Attorney General of New Jersey

FRANK MUROSKI
Deputy Attorney General
Counsel of Record

Division of Criminal Justice
Hughes Justice Complex
P.O. Box 086
Trenton, New Jersey 08625
(609) 292-9086

January 6, 2009

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

POINT I

Since the Lower Court Relied on *Florida v. J.L.* in Ruling That the Fourth Amendment Was Violated, this Court's Jurisdiction Is Unmistakable 1

POINT II

Respondent's Reliance on Various Federal Cases Further Shows the Need for this Court to Resolve the Issues Raised by this Case 2

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES CITED:

Baptiste v. State, 2008 Fla. LEXIS 1614, *reh'g denied*, 2008 Fla. LEXIS 2318 (Fla. Nov. 20, 2008) 3

Florida v. J.L., 529 U.S. 266 (2000) 1

Illinois v. Wardlow, 528 U.S. 119 (2000) 5

Jackson v. Commonwealth, 594 S.E. 2d 595 (Va. 2004) 3

Michigan v. Chesternut, 486 U.S. 567 (1988) 2

Michigan v. Long, 463 U.S. 1032 (1983) 2,6

Pennsylvania v. Labron, 518 U.S. 938 (1996) 2

Rivera v. State, 771 So.2d 1246 (Fla. Dist. Ct. App. 2000) 3

State v. Goree, 327 N.J. Super. 227, 742 A.2d 1039 (App. Div. 2000) 1

State v. Matthews, 398 N.J. Super. 551, 942 A.2d 797 (App. Div.), *certif. denied*, 196 N.J. 344, A.2d 763 (2008) 1

State v. Richards, 351 N.J. Super. 289, 798 A.2d 136 (App. Div. 2002) 1

United States v. Aguilera, 287 F. Supp. 2d 1204, (E.D. Cal. 2003) 8

United States v. Anderson, 339 F.3d 720 (8th Cir.), *cert. denied*, 540 U.S. 1084 (2003) 7

United States v. Arjona-Martinez, 66 Fed. Appx. 525 (5th Cir. 2003) 7

United States v. Blackshaw, 367 F. Supp. 2d 1165, (N.D. Ohio 2005) 8

United States v. Colon, 250 F.3d 130 (2d Cir. 2001) 9

United States v. Copening, 506 F.3d 1241 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008) 7

United States v. Elmore, 482 F.3d 172 (2d Cir. 2007) 7

United States v. Elston, 479 F.3d 314 (4th Cir.), *cert. denied*, 127 S. Ct. 2151 (2007) 4

United States v. Harrell, 268 F.3d 141 (2d Cir. 2001) 5

United States v. Heard, 367 F.3d 1275 (11th Cir.), *cert. denied*, 543 U.S. 913 (2004) 8

United States v. Hicks, 531 F.3d 555 (7th Cir. 2008) 4

United States v. Holmes, 360 F.3d 1339 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1098 (2005) 8

United States v. Hughes, 517 F.3d 1013 (8th Cir. 2008) 9

United States v. Muhammad, 463 F.3d 115 (2d Cir. 2006) 4

United States v. Perkins, 363 F.2d 317 (4th Cir. 2004), *cert. denied*, 543 U.S. 1056 (2005) 7

United States v. Pleas, 2007 U.S. Dist LEXIS 76237 (D. Mass. 2007) 8

United States v. Reed, 220 F.3d 476 (6th Cir. 2000), *cert. denied*, 531 U.S. 1103 (2001) 9

United States v. Ruidiaz, 529 F.3d 25 (1st Cir.), *cert. denied*, 129 S. Ct. 440 (2008) 3

United States v. Sanchez, 519 F.3d 1208 (10th Cir.), *cert. denied*, 129 S. Ct. 167 (2008) 8

United States v. Terry-Crespo, 356 F.3d 1170 (9th Cir. 2004) 4

United States v. Torres, 534 F.3d 207 (3d Cir. 2008) 7

United States v. Ubiles, 224 F.3d 213 (3d Cir. 2000) 6

United States v. Whitaker, 546 F.3d 902 (7th Cir. 2008) 4

United States v. Wooden, 2008 U.S. App. LEXIS 26412 (7th Cir. Dec. 29, 2008) 4

STATUTES CITED:

N.J. Stat. Ann § 2C:58-4 6

N.J. Stat. Ann. § 2C:58-4c 6

POINT I

Since the Lower Court Relied on *Florida v. J.L.* in Ruling That the Fourth Amendment Was Violated, this Court's Jurisdiction Is Unmistakable.

Respondent's jurisdictional challenge to this Petition should be summarily rejected. The lower court did indeed rely on *Florida v. J.L.*, 529 U.S. 266, 272–74 (2000), for the propositions that this Court rejected the "man with a gun" exception and held that an "anonymous tip standing alone cannot justify a *Terry* stop," as dispositive support for its decision. *State v. Matthews*, 398 N.J. Super. 551, 558, 942 A.2d 797, 802 (App. Div.), *certif. denied*, 196 N.J. 344, 953 A.2d 763 (2008). To resolve any doubt that the panel relied on *J.L.*, it stated, "Similar to the circumstances in *J.L.*, all the police had to go on was the bare report of an unknown unaccountable informant." *Id.* at 560, 942 A.2d at 803.

The appellate court also relied on its own prior case, *State v. Richards*, 351 N.J. Super. 289, 798 A.2d 136 (App. Div. 2002), for the same proposition. *Richards* relied on *J.L.* and recognized that "the federal and state standards for assessing the reasonableness of investigatory pat-down searches for weapons incident to such stops are identical." *Id.* at 300–01, 798 A.2d at 143. *Richards* then applied *J.L.* in detail to the facts of that case. *Id.* at 301–03, 798 A.2d at 143–45. To the extent that *Richards* relies on its own previous opinion, *State v. Goree*, that opinion relied on the Florida Supreme Court's decision that was affirmed by this Court in *J.L.* 327 N.J. Super. 227, 242–44, 742 A.2d 1039, 1048–49 (App. Div. 2000). And *Goree* interpreted and applied the Fourth Amendment and this Court's relevant precedents in reconciling state law to the federal standard. *Id.* at 234–45, 742 A.2d at 1044–50. In other words, a citation in a New Jersey opinion to *Richards* or *Goree* represents, for all practical purposes, reliance on *J.L.*

The citations below to state caselaw do not amount to a "clear and express" statement that the holding is based on a "bona fide separate, adequate and independent [state] ground" under *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). That is especially so as the cited precedent relied heavily on this Court's decisions in reaching its conclusions, just as in *Pennsylvania v. Labron*, 518 U.S. 938, 940–41 (1996), and *Michigan v. Chesternut*, 486 U.S. 567, 571 n.3 (1988), where jurisdiction was found. Thus, the state citations are not a "plain statement" sufficient to advise that the federal cases are only used for "guidance," particularly where the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law" and "the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Long*, 463 U.S. at 1040-41. It is clear that this Court has jurisdiction to review this matter.

POINT II

Respondent's Reliance on Various Federal Cases Further Shows the Need for this Court to Resolve the Issues Raised by this Case.

In respondent's brief in opposition, he string cites to a passel of federal cases in an attempt to show a consistent and effortless application of *J.L.* among the federal circuits. But Respondent not only fails to show any consistency, he misses the main thrust of the Petition. Crucial to recognizing the increasing discord on *J.L.*'s proper scope is to see how various *state* courts, including New Jersey, have substantially diverged from what is, at best, a majority (though not unanimous) view among the federal circuits concerning a relatively common fact pattern not directly addressed by *J.L.* — most notably, when the tip reports ongoing conduct that creates imminent, life-threatening danger. Respondent's failure to even

address the divergent state cases prominently put forth in the Petition is a tacit acknowledgment that such conflict among the state courts and between the state courts and a majority of Federal Circuits cannot be gainsaid. Nothing provided by respondent should in any way dissuade this Court from resolving this burgeoning conflict.

Respondent mostly cites to federal cases which actually recognize the distinction between *J.L.* and a case like this where the informant relays information about an ongoing life-threatening emergency. As noted both here and in the Petition, this recognition among a majority of federal circuits that *J.L.* does not apply to ongoing emergencies place it squarely at odds with an expanding body of state caselaw. In addition to the present case, *Jackson v. Commonwealth*, 594 S.E. 2d 595 (Va. 2004), *Rivera v. State*, 771 So.2d 1246 (Fla. Dist. Ct. App. 2000), and the more recent *Baptiste v. State*, 2008 Fla. LEXIS 1614, *reh'g denied*, 2008 Fla. LEXIS 2318 (Fla. Nov. 20, 2008), reject the notion accepted by most circuits (that the report of an ongoing gun emergency is not governed by *J.L.)* and incorrectly apply *J.L.* to reports of a brandished firearm. Such a conflict is an express ground for granting the Petition. *See* Supreme Ct. R. 10 (b). This case provides the perfect vehicle to remedy this increasing discord on *J.L.*'s proper application.

Contrary to these state decisions is *United States v. Ruidiaz*, 529 F.3d 25 (1st Cir.), *cert. denied*, 129 S. Ct. 440 (2008), *where J.L.* was rightfully distinguished on the ground that the initial stop was based on a traceable 9-1-1 call in which the caller identified himself as a neighbor, confirmed his telephone number, and agreed that the police could call him back, thus providing a level of inherent credibility not present in *J.L.* The First Circuit found such a caller to not be truly anonymous as it was here. But more significantly, *Ruidiaz* recognized in a footnote, without so ruling, that the content of the tip

referencing an ongoing emergency may also distinguish a case from *J.L.* *Id.* at 31 n.2. Likewise, in *United States v. Terry-Crespo*, 356 F.3d 1170, 1172–76 (9th Cir. 2004), the 9-1-1 caller provided his name and other identifying information and was not considered anonymous. Moreover, *J.L.* was distinguished because the informant was relaying the contemporaneous emergency event of the suspect's brandishing a firearm in a high-crime area, rather than the simple possession alleged in *J.L.* *Id.* at 1176.

The very recent Seventh Circuit cases relied on by respondent, *United States v. Whitaker*, 546 F.3d 902, 908–11 (7th Cir. 2008), and *United States v. Hicks*, 531 F.3d 555, 557–59 (7th Cir. 2008), arrived at the same conclusions. In fact, since Respondent submitted his brief, the Seventh Circuit once again addressed these issues and found that "[t]he district court did not err in concluding that the circumstances reported to the police implied a need for haste, and that a report by a person claiming to have seen a gun drawn in public provided articulable suspicion for a *Terry* stop and frisk." *United States v. Wooden*, 2008 U.S. App. Lexis 26412 (7th Cir. Dec. 29, 2008).

Another case cited by respondent at odds with the state cases is *United States v. Elston*, where the 9-1-1 call, even if it was considered anonymous, warranted the protective search of a truck because the caller described a threatening "brandishing" of a firearm, which distinguished the case from *J.L.* because it relayed "an imminent threat to public safety." 479 F.3d 314, 319 (4th Cir.), *cert. denied*, 127 S. Ct. 2151 (2007).

Respondent's reliance on *United States v. Muhammad*, 463 F.3d 115 (2d Cir. 2006), is also intriguing for it not only shows a disagreement among the circuits, it also shows the unreasonable level of corroboration required of an anonymous tip as result of a misinterpretation of *J.L.* In *Muhammad*, a female

caller reported after 11:13 p.m. that a black man on a bicycle, wearing a white sweat suit was carrying a gun "out in the open." The caller provided the bicyclist's street location, direction of travel, and nearest cross street in an area known to the Buffalo Police as a high-crime area. *Id.* at 118–19.

The panel discounted the tip based on its misreading of *J.L.* and ruled that the stop of the cyclist was warranted due to his headlong flight in a high-crime area under *Illinois v. Wardlow*, 528 U.S. 119 (2000). *Muhammad*, 463 F.3d 121–23. *Muhammad* thus concludes that police cannot take protective measures upon receiving a report of a man displaying a gun in a high-crime area unless the man takes flight. Such a misreading of *J.L.* renders the tip itself redundant because this Court has already held that such flight, without more, justifies a *Terry* stop. *Wardlow*, 528 U.S. at 124–25. This part of *Muhammad* seems at odds with the several other circuit courts discussed herein that recognize the distinction between a report suggesting an immediate or threatened use of a gun as opposed to its passive concealed possession. *Muhammad* thus not only indicates a divergence between the Second Circuit and the other circuits, it also shows how *J.L.* has been applied to circumstances for which it was not intended. A man riding around the residential streets of a high-crime area near midnight on a bicycle with a gun in full view bespeaks of an immediate danger for which due regard for public safety obligates the police to immediately address.

Respondent's invocation of *United States v. Harrell*, 268 F.3d 141 (2d Cir. 2001), as an example of the settled nature of *J.L.*, actually shows the contrary. For one, the stop in that case was found to be lawfully based on a traffic violation (ironically, tinted windows). *Id.* at 149. And more significantly, the concurring judge distinguished *J.L.* in part because the anonymous report that the suspect waived guns at the

caller amounted to an eyewitness account of ongoing criminal activity imbued with superior reliability to the mere report of a concealed weapon. *Id.* at 150. The concurring judge also distinguished *J.L.* from cases involving a call reporting present activity amounting to an imminent life-threatening danger to the community. *Id.* at 151.

If anything, the Second Circuit's opinion in *Muhammad*, and its internal disagreement as to how best to dispose of *Harrell*, amply demonstrate an active disagreement within that circuit, as well as disagreement with the other circuits as to *J.L.*'s application to a threat similar to the one reported at bar. Here, the caller's report of a flashing gun by someone at specific location and in a described vehicle, which the officers were unable to corroborate due to its tinted windows, and which is parked near a bar at 2:30 a.m., bespeaks of an eyewitness account of ongoing life-threatening conduct that requires immediate police action, not simply a generic report of gun possession.

Respondent's reliance on *United States v. Ubiles*, 224 F.3d 213 (3d Cir. 2000), is also curious because that case turned on the fact that the reported gun possession was not suspected of being illegal. *Id.* at 217.[1] In fact, the informant was not truly "anonymous" but came face-to-face with the police and was later identified and testified, *id.* at 215–16, and was thus assumed by the court to have been reliable.

---

[1] Respondent's attempt to show that the flashing of the gun reported in the present case was lawful under N.J. Stat. Ann § 2C:58-4 should be summarily rejected. Permits to carry weapons in New Jersey are uncommon and issued only for a justifiable need, not to flash about in public near a bar at 2:30 in the morning while using a car with darkened windows. *See* N.J. Stat. Ann. 2C:58-4c. Besides, the legality of the weapon does not render it any less of a threat to public safety and subject seizure under *Terry*. *See Long*, 463 U.S. at 1052 n.16.

Id. at 214 n.1. Interestingly, the court found noteworthy the absence of any reason for the officer to believe that the suspect had "brandished" the gun. *Id.* at 215. As such, one might surmise that the court would have reached a different conclusion had the informant stated that Ubiles had brandished or flashed the gun as opposed to merely having possessed it. Far from showing settled agreement, *Ubiles* actually shows uncertainty over whether a report of a brandished or flashed firearm is governed by *J.L.*

Respondent also relies on several circuit cases in which the informant was not considered completely anonymous, rendering such cases of little guidance for the issues raised here. In *United States v. Elmore*, the informant was considered a citizen informant who gave her full name, telephone and cellphone numbers, and identified herself as the suspect's girlfriend. 482 F.3d 172, 175–83 (2d Cir. 2007). In *United States v. Torres*, the 9-1-1 caller, known to be a taxi driver, provided detailed contemporaneous information as he pursued the suspect. 534 F.3d 207, 211–12 (3d Cir. 2008). In *United States v. Arjona-Martinez*, 66 Fed. Appx. 525 (5th Cir. 2003), the informant was known and reliable. In *United States v. Anderson*, there were at least three separate callers, all of whom corroborated each other, with one of the callers calling back to provide more information. 339 F.3d 720, 722–24 (8th Cir.), *cert. denied*, 540 U.S. 1084 (2003). In *United States v. Copening*, the traceable 9-1-1 caller called five times to give an ongoing account of the suspect's movements. 506 F.3d 1241, 1246–47 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008).

Respondent's reliance on *United States v. Perkins*, is equally unavailing because the police believed that the caller was the next-door neighbor and reasonably considered to be a likely known informant. 363 F.2d 317, 324 (4th Cir. 2004), *cert. denied*, 543 U.S. 1056 (2005). Moreover, as discussed in the Petition, *Perkins* convincingly criticizes an overly

technical application of *J.L.* that would require an unreasonable level of corroboration of all anonymous tips, especially those that report ongoing dangerous activity, such as the displaying and pointing of guns in a residential neighborhood. *Id.* at 324–26.

Respondent cites three case in which *J.L.* was distinguished because the informants were not considered truly anonymous since they reported their information to the police face-to-face. Such cases are of little value here. *See United States v. Holmes*, 360 F.3d 1339, 302–03 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1098 (2005); *United States v. Sanchez*, 519 F.3d 1208, 1213–15 (10th Cir.), *cert. denied*, 129 S. Ct. 167 (2008); *United States v. Heard*, 367 F.3d 1275, 1279–80 (11th Cir.), *cert. denied*, 543 U.S. 913 (2004).

Respondent's citations to United States District Court opinions are similarly unavailing. In *United States v. Pleas*, 2007 U.S. Dist LEXIS 76237 (D. Mass. 2007), the 9-1-1 caller was not considered completely anonymous because she realized her identity was capable of verification. Moreover, the officer's knowledge of the suspect corroborated the caller's report. *Id.* at *9–10. In *United States v. Aguilera*, 287 F. Supp. 2d 1204, 1211 (E.D. Cal. 2003), the caller was obviously a concerned parent who was waiting near the side of a school to pick up her child. She also stayed on the phone to give detailed contemporaneous information about an armed suspect who was entering the school. The case was also distinguished from *J.L.* because it took place on school grounds. *Id.* at 1209. And *United States v. Blackshaw*, is irrelevant because unlike the present case, the district judge was not convinced that the police even detained the correct car given the discrepancies between the caller's details and those testified to by the officer. 367 F. Supp. 2d 1165, 1172 (N.D. Ohio 2005).

Respondent cites to other cases that are largely irrelevant to the issues under review. In *United States*

v. Hughes, the stop was ruled invalid because it involved the investigation of an already-committed misdemeanor. 517 F.3d 1013, 1018 (8th Cir. 2008). But the court suggested in *dictum* that had that misdemeanor been accompanied by a weapons report, the result may have been different. *Id.* In *United States v. Colon*, the case turned on the fact that imputed-knowledge doctrine did not apply to what the civilian 9-1-1 operator knew but failed to tell the officers. 250 F.3d 130, 135–38 (2d Cir. 2001). In fact, *United States v. Reed*, 220 F.3d 476 (6th Cir. 2000), *cert. denied*, 531 U.S. 1103 (2001), does not even involve an informant. Thus, the application of *J.L.* in those cases is of no relevance to the present Petition.

In short, not only does respondent fail to prove his assertion that the circuits are in "solid agreement," he completely fails to even address the more active conflict between the various states' interpretation and application of *J.L.* and that of the several circuits as shown in the Petition. Indeed, respondent's complete failure to even address the conflict among and between the States and the federal circuits is telling and should be seen as a tacit recognition that such a conflict does indeed exist. This simmering conflict has now come to full boil in New Jersey and as shown in the Petition, it is not limited to New Jersey. Therefore, Petitioner asks this Court to grant this Petition to resolve this conflict.

CONCLUSION

Based on the foregoing arguments, Petitioner urges that this petition for a writ of *certiorari* be granted.

Respectfully submitted,

ANNE MILGRAM
Attorney General of New Jersey
Attorney for Petitioner

FRANK MUROSKI
Deputy Attorney General
Attorney of Record

FRANK MUROSKI
Deputy Attorney General
New Jersey Division of Criminal Justice
Appellate Bureau

of Counsel and on the Petition

Dated: January 6, 2009